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No. 71 - 1252

In the
Supreme Court of the United States
OCTOBER TERM, 1971

VICTOR SAMUEL KAMBER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Victor Kamber, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals is printed in the Appendix to this Petition. (Appendix A.).

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1971. (Appendix A). Timely Petition for

Rehearing was denied on March 27, 1972. (Appendix B.). Judge Otto Kerner participated in the original opinion but did not participate in the petition for rehearing. The jurisdiction of this Court is invoked in 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the Government deprive the petitioner his Fifth Amendment right to due process by its knowing exploitation of false evidence?

2. Was the petitioner denied his Sixth Amendment right to trial by a fair and impartial jury by the contamination of the jury caused by prejudicial trial publicity admittedly read by the jurors concerning the fact he had dated President Nixon's daughters, and by related references of the prosecution in its summation to the allegation that the petitioner was a member of "the American aristocracy"?

NATURE OF THE CASE

Petitioner was convicted by a jury of Count II of a two-count indictment brought under Title 50, Appendix, United States Code, Section 462 (a), which resulted in a sentence to the custody of the Attorney General for two years (A. 6). The jury acquitted the petitioner of the charges contained in Count I.

STATEMENT OF FACTS

Count II of the indictment, the count upon which the petitioner was convicted, charged that he, as a Selective Service registrant of Local Board 28 in Chicago, Illinois duly classified in Class 1-A ". . . wilfully and knowingly was a party to the making of a false statement bearing upon his

classification for service in the Armed Forces of the United States under the provisions of Title 50 Appendix, United States Code, and the rules, regulations, and directions made pursuant thereto, by causing the submission of a false and fraudulent statement to Local Board 28, Chicago, Illinois, to wit, a letter purportedly sent or authorized to be sent by John G. Handley, Chairman of the Division of Humanities, of Prince George's Community College . . . and addressed to Local Board No. 28 . . . when in truth and in fact, John G. Handley never sent or authorized to be sent the aforementioned letter and the statements contained therein were false; In violation of Title 50 Appendix, United States Code, section 462 (a)." (A. 8-10).

Petitioner registered in 1961 with Selective Service Local Board 28 in Chicago. On June 20, 1968 he was reclassified I-A and appealed the reclassification which was affirmed by the Appeals Board on September 16, 1968. He requested a "courtesy appearance" from the local board and appeared before two board members on October 8, 1968 and explained his full-time teaching capacity at Prince George's Community College in Largo, Maryland, where he had taught full time in the previous academic years of 1966-1967 and 1967-1968. One of the board members told him that the board believed that he was sincere. On October 17, 1968 he was notified that he had been reclassified II-A. On October 2, 1968, petitioner had mailed letters to the local board and to the Illinois State Director for Selective Service upon the advice of a family friend, Albert Imle, who was then an attorney working in the office of Governor Otto Kerner. Petitioner had the letter to the local board, which is the subject of Count II of the indictment, typed on September 30, 1968 by a secretary at Nixon Campaign Headquarters.

Kamber then attached the letters to a note he wrote to Dr. Handley and put the letters and note in one envelope with Handley's name on it. On the evening of Monday, September 30, 1968, he placed the envelope in Handley's college mailbox, one of the pigeon hole boxes in the large room outside the college office. On the following day, October 1, at approximately 6:00 P.M. Kamber found in his pigeonhole mailbox an envelope with the name "Vic Kamber" written on it. Inside were the two letters signed by Dr. Handley. Kamber then put the letters in his notebook and taught his evening classes. (A. 149). On October 2 Kamber again called Albert Imle, who advised him to have the letters notarized. (A. 149). Mrs. Clyde Kelly Byer, a notary public at Nixon Campaign Headquarters, notarized the signature on each of the letters. Kamber then took them back to his office, had envelopes typed, and mailed the letters to the local board and to Director Hammack. (A. 150).

At the time the letters were notarized Kamber was not aware that the signatures were not those of Dr. Handley, but believed them to be Dr. Handley's. (A. 150). Kamber did not sign Handley's name to the letters. On two separate occasions he gave handwriting samples to the F.B.I. both of his left and right hands. He testified that he did not wilfully or knowingly make a false statement to Local Board 28 in regard to his selective service classification. (A. 151). He testified that he did not know the signature on the October 2nd letter to Local Board 28 was not Dr. Handley's signature.

John G. Handley testified that the signature on the letter dated October 2, 1968 to Local Board No. 28 was not his signature and that he did not authorize any one to place his signature on the letter. Handley testified that in Feb-

ruary, 1969, he met the petitioner in Handley's office after the petitioner had been interviewed by F.B.I. agents. The petitioner had telephoned Handley for the appointment while the agents were with him. Handley testified the petitioner expressed surprise that Handley had not signed the letter. The petitioner told him he had written the letter himself, put it in Handley's mailbox one evening, came back the next evening and found it signed in his own mailbox. Handley testified the petitioner told Handley he wrote the letter himself, rather than asking Handley to write it, in order to expedite matters. (A. 111).

F.B.I. Agent Thomas Sullivan testified that during an interview with Kamber in Washington on February 5, 1969, he showed the petitioner the Handley letter to Local Board 28. (A. 114). Sullivan testified that Kamber told him that he wrote the letter himself because he had requested Handley to write a letter and Handley had refused. (A. 114). Sullivan further testified that Kamber told him he became upset over Handley's refusal to write the letter. (A. 114). The interview lasted one-half hour and Sullivan took no notes. (A. 181).

REASONS FOR GRANTING THE WRIT

I.

THE GOVERNMENT DEPRIVED THE PETITIONER OF HIS DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR TRIAL BY ITS USE OF FALSE EVIDENCE.

The prosecution knowingly presented false evidence to the jury through the testimony of Special Agent Thomas Sullivan of the Federal Bureau of Investigation. The mandate of *Miller* v. *Pate*, 386 U.S. 1 (1967), and its predecessor line of cases is that the deliberate misrepresentation of the truth by the Government in and of itself is sufficient to require a reversal of a conviction. Cf. *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Napue* v. *Illinois*, 360 U.S. 264 (1959).

The other side of the due process coin is that the Government cannot suppress evidence favorable to an accused where the evidence is material either to guilt or to punishment, irrespective of its good faith or bad faith. *Brady* v. *Maryland*, 373 U.S. 83 (1963). We now turn to an analysis of the testimony to demonstrate how the prosecution knowingly presented false evidence and wilfully concealed favorable evidence.

The issue of whether the petitioner had asked Dr. Handley to write a letter to the petitioner's local draft board prior to October 2, 1968 was crucial to the outcome of the case. The jury may well have convicted the petitioner simply upon the false evidence that Dr. Handley had refused such a request. Why? If Dr. Handley had in fact refused Kamber such a letter, the petitioner must have known that the signature on the October 2 letter was not Handley's signature. The only two persons who were qualified to know whether or not a request for a letter had been made or refused prior to October 2nd were Dr. Handley

and Victor Kamber. Unmistakably clear is the fact that Victor Kamber testified that no such request was made or denied. At no time in his testimony did Dr. Handley state that the petitioner had requested and had been refused a letter to Local Board 28. Nonetheless, in utter disregard of the testimony of its own witness, and in utter disregard of its own investigation, the Government proceeded to establish through Agent Sullivan the false evidence that in an oral statement to Sullivan on February 5, 1969, the petitioner purportedly had said that Handley had refused to write a letter to the petitioner's local draft board in Chicago prior to October 2, 1968, and that the petitioner was "upset" by this. (A. 114). The Government was not content with simply presenting this erroneous information through the testimony of Agent Sullivan: it revived the incident during cross-examination of the petitioner and concluded its summation to the jury with generous reference to the alleged oral statement (A. 159-160; A. 175; A. 197).

Agent Sullivan testified that he interviewed the petitioner on February 5, 1969, at the Pension Building in Washington, D.C. in the company of Special Agent Kim Kelly. We note first that Kelly was never called to corroborate Sullivan's testimony of an alleged oral admission by the petitioner and, second, that Sullivan made no notes during the course of this half hour interview. (A. 161). Sullivan stated that he exhibited the October 2, 1968 letter bearing Handley's signature to the petitioner. He then testified:

> Q. Were there any further discussions between you and the defendant after you had displayed the letter to him?
>
> A. Yes, sir, there was.
>
> Q. And where were those?
>
> A. Mr. Kamber stated that he was a teacher at Prince George's Community College, and prior to the date on this letter October 2, had requested that Mr.

Handley, who was at that time his superior, or immediate supervisor, to write a letter to his local draft board at Chicago stating that he was an integral part of the teaching staff at Prince George's Community College.

Q. Did anything further occur at that particular time?

A. Yes, sir, there did. He said that Mr. Handley refused to write such a letter, and Mr. Kamber stated to me that he became upset over this. (A. 114).

Agent Sullivan was provided with a further opportunity to cast additional emphasis upon this alleged oral admission:

By Mr. Hoffman:

Q. Now, were there any further conversations with you and the defendant as to the preparation of the letter?

A. Yes, sir, there was.

Q. Would you please relate those?

A. Mr. Kamber stated that after Mr. Handley refused to write such a letter, that he prepared the letter—

Q. "He" meaning who?

A. Mr. Kamber.

Q. All right.

A. (continuing:) Had prepared this letter, had it typed and deposited in Mr. Handley's mail box at the college—this letter, thinking that after Mr. Handley saw the letter typed up, that he would have a change of mind and sign it. (A. 115).

Sullivan was called by the Government *after* Dr. Handley had testified. There is absolutely nothing in the testimony the Government elicited from Dr. Handley when he was previously on the stand that lends any corroboration to the existence of an alleged incident in which the petitioner had requested a letter from him prior to October 2,

1968. On the contrary, the Government had in its possession prior to the trial of this cause an F.B.I. 3500 report which categorically established that no such incident occurred. The report of a Federal Bureau of Investigation interview with Dr. John Handley dated November 4, 1969, under the signature of Special Agent George T. Cronin contained the following paragraph:

> With regard to the nature and detail of discussions with KAMBER concerning the writing of a letter to Local Board 28, Chicago, Illinois on KAMBER's behalf, Handley advised that at no time was he asked by KAMBER to write such a letter.[1]

The 3500 report of the Handley interview with Agent Cronin was tendered to the defense only shortly before Handley's appearance on the witness stand. The Government had stated that it would tender discoverable statements only at the beginning of the session during which the witness would testify. (A. 27). The defense relied in good faith upon the prior F.B.I. statement given by Dr. Handley that no incident ever occurred in which Handley had refused to write a letter to Mr. Kamber's draft board.

In *Berger* v. *United States*, 295 U.S. 78 (1934) this Court held:

> "The United States Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice

[1] The November 4, 1969 F.B.I. interview with Dr. Handley is properly in the record. See item 59 of the stipulation between the parties to this appeal incorporating this F.B.I. report into the record on review. (C. 179.) The Petitioner's Motion for a New Trial specifically referred to this report in Paragraph 11(e). (C. 165.)

> shall be done. As such, he is in a peculiar and very definite sense a servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones . . ."

The Seventh Circuit Opinion seeks to avoid this constitutional question by asserting two grounds: (1) Petitioner was given the report of the Handley interview prior to Handley's testimony and Sullivan's report prior to Sullivan's testimony in compliance with 18 U.S.C. Section 3500; (2) Petitioner waived cross-examination of Handley and failed to call him in rebuttal. It is apparent that the issue petitioner has raised has nothing to do with the requirements of 18 U.S.C. Section 3500. The waiver position of the Seventh Circuit ignores the chronological fact that Handley testified before Sullivan and hence petitioner could not prophesy that Sullivan's testimony would directly contradict Handley. Petitioner could not cross-examine Handley about Sullivan's testimony when Sullivan had not yet testified. The sequence in which the witnesses were called was completely under the control of the prosecution.

In suggesting that petitioner should have called Handley in rebuttal, the Seventh Circuit sets forth a rule which would require a defendant to assume the burden of correcting the knowing use of false testimony by the Government.

The law lays no such burden at the feet of the defense. Additionally, the petitioner had no way of predicting that the Government would engage in a strenuous and outrageous use of this false evidence in its summation. The prosecutor utilized Sullivan's false testimony as one of the cornerstones of his argument. (A. 175; A. 197).

The spectacle of a Federal prosecutor, supposedly dedicated to justice, brazenly pitching a major portion of his closing argument on evidence introduced by him which he knows to be false and conclusively refuted by other evidence from his own key witness and which he has deliberately contrived to withhold from the Court and jury, must surely give this Court pause.

This case presents a proper vehicle for this Court to establish the principle that the burden of correcting the knowing use of false evidence by the Government is upon the Government and not upon the defense.

II.

THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO TRIAL BY A FAIR AND IMPARTIAL JURY.

Petitioner's argument is premised upon two facts: (1) the trial jury was exposed to extrajudicial statements in news articles connecting him as an escort for the two daughters of President Richard M. Nixon; (2) the use of the petitioner's political and social status as a vehicle for inflaming the jury against him by characterizing him as a member of "the American aristocracy". The first premise involves the issue of contaminating publicity to which the jury becomes exposed after the trial has commenced. No pre-trial publicity concerning this indictment occurred in the Northern District of Illinois prior to the commencement of the trial on March 23, 1970. On March 24, 1970 the following article was published in one of the two morning Chicago newspapers, *The Chicago Sun-Times:*

TRICIA ESCORT TRIED FOR DRAFT EVASION HERE

By Maxine Cheshire

Special from the Washington Post

The head of the national Young Republican's annual leadership training school went on trial before a jury Monday in Chicago on charges of draft evasion.

Victor Kamber, a speech professor at Prince George's Community College in Maryland until last year, was indicted March 27, 1969, on two counts of "submitting or causing to be submitted" false statements that would have entitled him to exemption from military service.

(The defendant is a former Chicagoan who registered at a draft board here necessitating a local trial, according to Assistant U.S. Atty. Howard M. Hoffman, who is handling the case before U.S. District Court Judge Alexander Napoli.)

Kamber, in connection with his Young Republican duties, has been an escort for both daughters of President Nixon.

Takes Tricia to reception

Twelve days before his indictment, Kamber was Tricia Nixon's official escort when she attended a reception at the GOP leadership training school he was conducting at Washington's Shoreham Hotel.

During the summer of the presidential campaign, Kamber was Julie Nixon's official escort on a Potomac boat ride given by D.C. Young Republicans to raise money for the Nixon-Agnew campaign.

The U.S. attorney's office in Chicago said Monday that Kamber's indictment charges that on Sept. 23, 1968, he "made a false statement to the local Board 28 that he had earned the rank of associate professor and chairman of the department of speech at the Prince George's Community College."

According to the indictment, he had neither of these posts.

A spokesman for the college said Monday night that Kamber, 27, was "assistant professor" when he left the faculty "sometime in 1969."

Claimed an integral role

A second charge against Kamber alleges that after he had been classified 1-A for military service, he "submitted or caused to be submitted" a letter purportedly written by his immediate superior, John G. Handley, chairman of the division of humanities at the college.

The letter, which the government indictment says was "never sent or authorized by Handley," urged the draft board to reconsider Kamber's classification because of the "integral" role he played in the college's program.

His conscription, the letter continued, would be a blow to the student body and to the college itself.

Kamber, although his indictment has been pending for a year, has maintained his role with the Young Republicans. He was chairman again this year of the 1970 leadership training school which took place nine days ago at the Shoreham.

After the publication of this article, the Court conducted a voir dire examination on March 24, 1970 which disclosed that eight of the selected jurors read the article and two other jurors heard it discussed. Jury discussion of the Tricia Nixon story is direct, unspeculative, and concrete proof that the article had a substantial impact on at least 10 of the 12 minds which were chosen to sit as the petitioner's fair and impartial finders of fact.

The Seventh Circuit dismissed the prejudicial publicity issue summarily for two reasons: (1) The judge conducted an examination of the jurors by interrogating them each out of the presence of the other; (2) the article was not prejudicial as a matter of law.

Declarations by members of the jury that their exposure to media recitations of prejudicial and inadmissible evidence will not prevent them from being fair and impartial are not binding upon either common sense or reviewing tribunals. In *Irvin* v. *Dowd,* 366 U.S. 717, 727-728, this Court found that ". . . the influence that lurks in opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." The *Irvin* Court further observed: "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

It is difficult to understand how statements of fact published in the *Sun-Times* article can be held as a matter of law to be non-prejudicial. An analysis of the contents of the article establishes that the jury was exposed to the following facts:

(1) The article did not originate with a local journalist's report of the first day of trial. Rather, it was by-lined prominently as a "Special" from the Washington Post authored by a well-known White House Society correspondent in Washington.

(2) The focal point for the headline and the prominent placement of the story on Page Three (the first right-hand page in a tabloid-sized newspaper) was that the petitioner was an escort for Tricia Nixon.

(3) The petitioner was the head of a National Young Republican's annual leadership training school.

(4) The petitioner, in connection with his Young Republican duties, had been an escort for both daughters of President Nixon.

(5) After a bold-faced sub-heading reading "Takes Tricia to Reception" the article recited that twelve days before his indictment the petitioner was Tricia Nixon's official escort when she attended a reception at the GOP Leadership Training School he was conducting at the Shoreham Hotel in Washington.

(6) During the summer of the Presidential campaign, the petitioner was Julie Nixon's official escort on a Potomac boat ride given by the District of Columbia Young Republicans for the raising of money for the Nixon-Agnew campaign.

(7) The petitioner had maintained his role with the Young Republicans although his indictment had been pending for a year.

(8) The petitioner was chairman again in 1970 for the leadership training school which took place at the Shoreham Hotel in March of 1970.

The defendant was unfairly judged by different standards than would have applied if his substantial activity in the Republican party and his close social relationship with Tricia and Julie Nixon had not been introduced to the fact finding process.

Jury infection only began with the ingestion of the *Sun-Times* article by the jurors. The worst possible implications which could be drawn from the publicity were dramatically resurrected for the jury in the prosecutor's summation when he stated that the single most abominable facet of the case was the petitioner's attempt to shield himself ". . . behind the American aristocracy." (A. 180). The prosecutor's words taken in their full context are the clearest proof of the intent with which they were made:

> And then the defendant's fantastic background, a background we cannot and will not deny, the many wonderful titles, positions of trust that the defendant has had over the years—college, graduate school, and now he teaches. The most incredible thing is that the defendant would want to hide and shield himself behind this background. The law is one which applies itself, hopefully, equally. It is one which must be meted out equally. There is no American aristocracy, and merely because an individual has accumulated degrees, which sometimes aren't worth more than the paper they are written on, sometimes—
>
> Mr. Cotsirilos: I object to this line of argument, your Honor.
>
> The Court: The objection is overruled. He may argue. You have four minutes left, Mr. Hoffman.
>
> Mr. Hoffman: I would have been done, Judge. If you shield yourself behind the American aristocracy, or the hopes that one might exist—
>
> Mr. Cotsirilos: Judge, I object to that term, "American aristocracy."
>
> The Court: Oh, counsel may argue his case. Proceed.
>
> Mr. Hoffman: (Continuing:) Is to me probably the most single abominable facet of this case. (A. 180).

In the ultimate analysis, only a jury can strip a man of his liberty or his life. *Irvin* v. *Dowd*, 366 U.S. 717, 722. The *Sun-Times* article, the Tricia Nixon photograph, the undisputed awareness and interest of the jury in extra-judicial and inadmissible facts, the overwhelmingly prejudicial appeal to convicting the defendant because of his association with "an American aristocracy", the totality of this prejudicial input to the issue of the defendant's guilt or innocence constituted a denial of his Sixth Amendment right to trial by a fair and impartial jury. The integrity of the system of trial by jury commands that a verdict returned by a jury subjected to a vitriolic appeal to convict a man because of his political and social stature cannot be permitted to stand.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that a writ of certiorari be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 18756

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR SAMUEL KAMBER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 69 CR 207

ALEXANDER J. NAPOLI, *Judge.*

November 19, 1971

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and KERNER, *Circuit Judge.*

SWYGERT, *Chief Judge.* This is an appeal from a conviction following a jury verdict of guilty on the charge that defendant Kamber "willfully and knowingly was a party to the making of a false statement [to selective service] bearing upon his classification for service in the Armed Forces of the United States" in violation of 50 U.S.C. App. § 462(a).

Defendant registered in 1961 with his local board in Chicago. After being initially classified I-A in 1964, he obtained various deferments until June 20, 1968 when he was reclassified I-A. He appealed the reclassification

which was affirmed by the appeals board on September 16, 1968. After receiving notification that the I-A classification had been affirmed, defendant called his local board to request a courtesy appearance in order to seek a II-A occupational deferment. On September 25, 1968 he received notification that he would be allowed a courtesy appearance at the October 8 meeting of the board.

On October 2 defendant mailed to his local draft board and to the Illinois State Director of Selective Service identical letters purporting to bear the signature of J. G. Handley, Chairman of the Division of Humanities at Prince George's Community College in Largo, Maryland, where defendant was employed as an assistant professor of speech. The letters were highly laudatory of defendant and spoke of him as being virtually irreplaceable. It is undisputed that defendant drafted the letters, had them typed on the college's letterhead stationery, had the signature notarized (by assuring a notary public who had not witnessed the affixing of the signatures, that they were genuine) and personally mailed the letters.

The local board received the October 2 letter purportedly signed by Handley on October 4. On October 8 defendant appeared before the board for the courtesy appearance previously granted. The defendant was reclassified II-A on October 14, 1968. Then, on October 15, 1968, Handley wrote to the Illinois Headquarters of the Selective Service System in response to a letter from the headquarters advising him that his letter of October 2 relating to defendant's request for deferment had been received. Handley reported that he had never before written to Illinois Selective Service. After investigation confirmed that the signature on the October 2 letters was not Handley's, this prosecution followed.

Defendant challenges the validity of his conviction on several grounds: the jury was prejudiced by publicity during the trial; the Government failed to prove beyond a reasonable doubt the essential elements of the crime charged; the proof varied fatally from the crime charged

in the indictment; all or part of 50 U.S.C. App. § 462(a) is void for unconstitutional vagueness; and the Government's case included false evidence and improper cross-examination which denied defendant a fair trial. We affirm the conviction.

The factual basis for the claim of prejudicial publicity during the trial is as follows. On the day the trial began, defense counsel specifically declined to have the district judge caution the jury with regard to publicity. The following morning an article about the trial appeared in the Chicago Sun-Times under the headline, "Tricia escort tried for draft evasion here." The article, other than paraphrasing the essential allegations of the indictment, related only that defendant was active in the upper echelons of the Young Republicans, that he remained so active after his indictment and that he had escorted Tricia Nixon to one political affair and Julie Nixon to another in recent times. The trial court conducted a voir dire examination of each juror out of the presence of the others on the morning the article appeared to determine whether any had read it and, if so, whether any thought it had prejudiced them about the case. Eight of the jurors stated that they had read the article, and two of the remaining jurors had heard it discussed. However, no juror thought that the article had prejudiced him with regard to the case, and several stated that they did not learn anything new from the article. Juror Langland was excused by the court on the basis of her answers at that voir dire, but the reason for excusing her was that she stated to the court that she was unsure of her impartiality because of deferment problems faced by her draft-eligible son.[1]

We agree with the district judge that the newspaper article was not prejudicial. We find it hard to believe that a petit jury would be prejudiced against a man on

[1] The trial continued with a jury of eleven in accordance with a stipulation entered into by the parties. The issue of prejudicial publicity was not waived thereby, however.

the basis of an article which said no more than what the instant piece did. Rather, we believe that this case is governed by *United States* v. *Jannsen,* 339 F.2d 916, 919-20 (7th Cir. 1964), where we also held that a challenged newspaper article could not be said to be prejudicial as a matter of law. Moreover, the judge here conducted the examination of the jurors after the appearance of the article in accordance with the practice we approved in *United States* v. *Accardo,* 298 F.2d 133 (7th Cir. 1962), of interrogating each juror out of the hearing of his fellows, even though the judge did not believe the article was prejudicial. Defendant was not deprived of due process by prejudicial publicity.

Defendant's contention that the proof was inadequate to convict is also erroneous. Viewing the evidence in the light most favorable to the Government, the evidence was clearly sufficient to warrant submission to the jury. Nor was this a case where a standard requiring less than proof beyond a reasonable doubt was applied, contrary to the assertion of defendant, so that *In re Winship,* 397 U.S. 358 (1970), has no application here.

Defendant also argues that the proof varied fatally from the charge contained in the indictment. This contention is based upon the theory that the term "false statement" as used in 50 U.S.C. App. § 462(a) refers only to a statement conveying false information about a registrant and does not refer to a statement which, although forged, contains truthful information. We do not believe such a hairsplitting distinction is justified, nor have we found any authority for it. To forge a document is to produce a false imitation, a counterfeit of it. By the same token, to make a false statment is to make a statement which contains materially false information or which falsely identifies the source of the information. Therefore, even if we assume that defendant proved that every other material fact contained in the October 2 letter was a truthful statement except its identification of Handley as its author, that letter would still be a prohibited false statement within the intendment of the statute.

Defendant further contends that the Government failed to prove that the letter of October 2 "bore upon" his draft classification. In so doing he urges that we adopt the myopic view that the filing of a false statement with a draft board may not be prosecuted as a crime unless the statement is, in effect, a proximate cause of an improper classification. However, defendant ignores the language of the statute in the presentation of this argument, for the statute punishes "any person who shall knowingly make, or be a party to the making, of any false statement or certificate *regarding or bearing upon* a classification." 50 U.S.C. App. § 462(a) [emphasis added]. The juxtaposition of "regarding" with "bearing upon" makes very clear that the legislative intent of the Congress was not to require a showing of proximate cause as an element of the crime of being a party to the filing of a false statement with selective service officials. Indeed, such a strained construction would do grave disservice to the obvious legislative purpose behind the statute—ensuring that draft boards could depend on the veracity of statements submitted to them by providing criminal sanctions for falsification. If the selective service system were to have to bear the heavy burden of proving beyond a reasonable doubt that a particular statement was determinative of the votes of a majority of a local board, then the legislative purpose—which makes possible the operation of a largely self-executing system of conscription—could easily be frustrated.

Defendant argues that 50 U.S.C. App. § 462(a) is violative of the due process clause of the fifth amendment as being so vague as to warn insufficiently of what it is that it prohibits, thereby seeking to invoke the rule of *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939), and *Connally* v. *General Constr. Co.*, 269 U.S. 385 (1926), that statutes suffering from such vagueness are void. In so doing, defendant urges that the prohibition against knowingly being "a party to the making . . . of a false statement . . . bearing upon a classification . . ." is the locus of the fatal vagueness. We fail to see how the

prohibition is vague. The term "parties" has a settled meaning in the law as denoting those "who take part in the performance of any act." BLACK'S LAW DICTIONARY 1275 (4th ed. 1951); 2 BOUVIER'S LAW DICTIONARY 2460 (8th ed. 1914). Thus, the statute quite clearly prohibits knowing participation in the making of a false statement bearing upon a draft classification and cannot be said to be void for vagueness.

Finally, defendant contends that the Government submitted evidence to the trial court known to the prosecutor to be false. The basis for this allegation is that Agent Sullivan of the F.B.I. testified that in an interview on February 5, 1969 defendant stated that Handley had refused a request for a letter similar to the October 2 forgery, while the statement of Handley taken by Agent Cronin on November 4, 1969 was to the effect that defendant had never requested such a letter. Defendant conceded that the report of the Handley interview was given to his counsel prior to Handley's testimony and the report of the defendant's interview was given to counsel prior to Agent Sullivan's testimony. That is more than is required by 18 U.S.C. §3500 and more than enough of an opportunity for defendant to call Handley in rebuttal. Moreover, the defense waived cross-examination of Handley. We hold, therefore, that, if the was any error in the admission of Sullivan's testimony, it was not preserved by the defendant. Defendant also objects to the form of the Government's cross-examination of defendant and the witness Imle. While some of the questioning was arguably improper, we find that such error as there may have been in this regard was harmless.

The judgment of the district court is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
March 27, 1972.
Before
Hon. Luther M. Swygert, Chief Judge
Hon. John S. Hastings, Sr. Circuit Judge

United States of America, Plaintiff-Appellee, No. 18756 vs. Victor Samuel Kamber, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division (69 CR 267)

It Is Ordered by the Court that the petition for rehearing filed in the above-entitled cause be and the same is hereby denied.

Judge Kerner participated in the decision in the above-entitled cause but did not participate in the petition for rehearing.

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FILED
MAY 25 1972
MICHAEL RODAK, JR., CLERK

No. 71-1252

In the Supreme Court of the United States

OCTOBER TERM, 1971

VICTOR SAMUEL KAMBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1252

VICTOR SAMUEL KAMBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willfully and knowingly being a party to the making of a false statement bearing upon his classification for service in the armed forces, in violation of 50 U.S.C. App. 462(a), and was sentenced to two years' imprisonment.[1] The court of appeals affirmed (Pet. App. 1a-6a).

Petitioner registered with his local board on August 15, 1961, and except for three brief intervals was deferred from service as a student (class II-S) or as

[1] Petitioner was found not guilty of the charge of willfully and knowingly making a false statement to his local board bearing upon his classification for service, in violation of 50 U.S.C. App. 462(a).

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a teacher (class II–A) until June 20, 1968, when he was classified I–A (SSF A–56).[2] Upon receipt of his notice of classification, petitioner advised his local board that he wished to appeal his I–A classification in that he was employed as a full-time associate professor at Prince George's Community College in Largo, Maryland (SSF A–33). Petitioner's file was then transmitted to the appeal board which voted unanimously (4–0) on September 10, 1968, to retain him in his I–A classification (SSF A–38). Petitioner then requested a courtesy interview with the local board to discuss his II–A deferment (SSF A–41), which was granted and scheduled for October 8, 1968 (SSF A–43). Prior to this interview, letters were received by the local board and the State Director of the Selective Service System, dated October 2, 1968, purportedly signed by Dr. J. G. Handley, Chairman of the Division of Humanities at Prince George's Community College, requesting reconsideration of petitioner's I–A classification (SSF A–47, 48). The letters were highly laudatory of petitioner stating that his departure would be a severe loss to both the college and the student body and further indicating that it would be extremely difficult to replace petitioner at that time (*ibid.*). Upon acknowledging receipt of the letter (SSF A–51), the State Director's office received a reply from Dr. Handley disavowing any knowledge of the October 2, 1968, letter. Dr. Handley further in-

[2] "SSF" refers to petitioner's Selective Service file introduced as Government Exhibit A in the district court.

[3] Petitioner subsequently notified his local board that he could not keep the appointment (SSF A–49).

dicated that, though petitioner had previously requested the president of the college to write the local board regarding his classification, the president had declined upon Dr. Handley's recommendation because petitioner's record at the college was far from exemplary and it would not be difficult to find a replacement for him (SSF A–52). Thereafter, an investigation was initiated and petitioner's indictment followed.

On the morning following the commencement of the trial, an article appeared in a local newspaper regarding petitioner's trial (Pet. App. 3a). The article paraphrased the essential allegations of the indictment and related that petitioner had held a position in the upper echelons of the Young Republicans and had remained in that position after his indictment (*ibid.*). The article also reported that on two occasions petitioner had, by virtue of his position, escorted President Nixon's daughters to political affairs in Washington (*ibid.*). The trial judge conducted a *voir dire* examination of each juror out of the presence of the others to determine whether the juror had read the article and, if so, whether the juror felt the article would prevent him from considering the case impartially (*ibid.*). Although eight of the jurors stated that they had read the article, and two of the remaining jurors had heard it discussed, none thought that the article had prejudiced them, and several stated that they did not learn anything new from the article (*ibid.*).

During the trial, Dr. Handley testified for the government that he neither prepared nor signed the October 2, 1968, letter submitted by petitioner to the local

board (Tr. 110).[4] Petitioner waived cross-examination of Dr. Handley (Pet. App. 6a). Also called by the prosecution was Special Agent Thomas Sullivan of the F.B.I., who had interviewed petitioner previously regarding the October 2, 1968, letter. Sullivan testified that petitioner had told him that he had requested Dr. Handley to write a letter to his local board regarding his classification, but that Dr. Handley had refused (Tr. 114). Sullivan testified that petitioner had related that he then prepared the October 2, 1968, letter himself and deposited it in Dr. Handley's mail box at the college thinking that once Dr. Handley saw the letter he would change his mind and sign it (Tr. 115). Petitioner had then, according to his account to Sullivan, gone to his own mail box and found the letters puportedly signed by Dr. Handley (Tr. 115), which he had notarized and mailed to his local board and the State Director.

1. Petitioner contends here, as he did below, that he was deprived of a fair trial in that the government presented false evidence to the jury through the testimony of Special Agent Sullivan to the effect that petitioner had asked Dr. Handley, prior to October 2, 1968, to write a letter to his local board regarding his classification. Petitioner seeks support for his contention in the fact that in an interview with the F.B.I. prior to trial, Dr. Handley had denied that petitioner had previously asked him to write a letter to the local board. Dr. Handley's statement, however, even if ac-

[4] "Tr." refers to the transcript of the proceedings in the district court contained in Appellant's Appendix filed in the court of appeals.

cepted as true, does not establish that Sullivan's testimony was false since Sullivan only testified as to what petitioner had told him. Moreover, petitioner was given a copy of both Dr. Handley's statement to the F.B.I. and Sullivan's report prior to the testimony of each at trial, yet petitioner waived cross-examination of Dr. Handley and did not refer to any inconsistency in his cross-examination of Sullivan. Although available, neither witness was recalled by petitioner to explore possible inconsistencies. Under the circumstances, petitioner's assertion that the government was under an obligation to call additional witnesses to bolster or rebut Special Agent Sullivan's testimony is without merit. See *United States* v. *Higginbotham*, 451 F. 2d 1283, 1285–1286 (C.A. 8); *Zammar* v. *United States*, 217 F. 2d 223, 226 (C.A. 8); *Miller* v. *United States*, 53 F. 2d 316, 317 (C.A. 7).

2. Petitioner also contends that the appearance of the newspaper article on the first full day of his trial deprived him of a fair and impartial trial. This contention is without merit. As observed by the court of appeals, "it [is] hard to believe that a petit jury would be prejudiced against a man on the basis of an article which said no more than what the instant piece did" (Pet. App. 4a–5a). Here, the article related little more than what was contained in the indictment (*cf. United States* v. *Cook*, 432 F. 2d 1093, 1105 (C.A. 7)), and each juror, when interrogated out of the hearing of the remaining jurors, affirmatively stated that the article had no prejudicial effect upon his ability to render an impartial decision in the case. Under such circumstances, petitioner was not deprived of due proc-

ess by prejudicial publicity. See *United States* v. *Hyde*, 448 F. 2d 815, 847–850 (C.A. 5); *United States* v. *Jannsen*, 339 F. 2d 916, 919–920 (C.A. 7).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972